

CRIMINOLOGY OF INTERNATIONAL CRIMES: A REVISION OF THE CRIME OF AGGRESSION FROM A CRITICAL CRIMINOLOGY PERSPECTIVE¹

Aroa Ruiz Martínez

Graduada en Criminologia
Universitat Autònoma de Barcelona

ABSTRACT

This paper focusses the debate on the crime of aggression, analysing it from the perspective of critical criminology, taking as main hypothesis the idea that crime of aggression, as it is currently typified in the Rome Statute, does not criminalize the actually capable powers to commit crime of aggression, whereby the efforts made in order to prevent and punish this crime would not be effective.

The analysis of the elements of the crime take us to the conclusion that, even when the inclusion of the jurisdiction over the crime of aggression in the Rome Statute and its subsequent drafting in the Kampala conference is a giant step for the international recognition of aggression as a crime, this step skims the symbolic to criminalize the actually capable powers to commit crime of aggression, whereby the efforts made in order to prevent and punish this crime are useless at all, since the crime type might not be correctly focussed.

At the end of this paper some suggestions and future working lines are proposed in order to promote the recognition and real persecution of the crime of aggression, as it is can be understood from a critical criminology perspective.

Key words: critical criminology, crime of aggression, prosecution, Rome Statute.

RESUMEN

Este trabajo se centra en el debate sobre el crimen de agresión analizándolo desde la perspectiva de la criminología crítica, tomando como hipótesis principal la idea de que el crimen de agresión, tal y como está tipificado actualmente en el Estatuto de Roma, no sirve para perseguir a los países que son realmente capaces de cometer crimen de agresión, por lo que los esfuerzos realizados a fin de prevenir y sancionar este delito no serían eficaces. El análisis de los elementos del delito nos lleva a la conclusión de que, incluso cuando la inclusión de la jurisdicción sobre el crimen de agresión en el Estatuto de Roma y su posterior redacción en la conferencia de Kampala es un paso gigante para el reconocimiento internacional de la agresión como un crimen, este paso roza lo simbólico para la criminalización de los poderes realmente capaces de cometer el crimen de agresión, por lo que los esfuerzos realizados con el fin de prevenir y sancionar este delito no son eficaces en absoluto tal y como están enfocados en este momento.

Al final del trabajo también se proponen algunas sugerencias y líneas de trabajo futuras para el reconocimiento y la persecución real del crimen de agresión desde la teoría criminológica.

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Palabras clave: criminología crítica, crimen de agresión, persecución, Estatuto de Roma.

INTRODUCTION

Critical criminology, as the rest of the conflict theories, namely radical and Marxist theories of criminology, bases its analysis of criminal phenomena and its control between classes conflicts and the confrontation between sectors or social groups with conflicting interests². From this view, it cannot be considered that the organization of states, including the organization of the law enforcement and penal system, represents the values of society. However, it can be said that what is represented are the values and interests of those social groups with enough power to control the system³.

Thus, critical criminology highlights the working order of crime control structures and how they perpetuate the economic power of the ruling classes, whether if it is their principal aim or not ⁴.

Even when critical criminology, as all theoretical trends in criminology, has received lots of criticism ⁵, it cannot be denied that the dogmatic debate on what the real purpose of criminal justice is, which social groups it benefits or if it really works or not, it is on the table.

This paper focusses the debate on the crime of aggression, analysing it from the perspective of critical criminology, taking as main hypothesis the idea that the crime of aggression, as is currently typified does not criminalize the actually capable powers to commit crime of aggression, whereby the efforts made in order to prevent and punish this crime would not be effective at all.

This will be done from the analysis of the elements of the crime as typified in the Rome Statute. Therefore, the structure of this paper will be divided into a first descriptive part of the history of the categorisation of the crime of aggression by international organisms, followed by a second part in which the above analysis is developed.

I. DEFINITION OF THE CRIME OF AGGRESSION

² Cid, José and Larrauri, Elena. "Teorías Criminológicas." Barcelona: Bosh, 2001

³ Volds, George B. and Bernard, Thomas J. "Theoretical Criminology". New York: Oxford University Press, 1986

⁴ Pavarini, Massimo. "Control y dominación". México: Siglo XXI Editores, 1988

⁵ Aebi, Marcelo. "Critica de la criminologia critica: una lectura escèptica de Baratta". Salamanca: Ediciones Universidad, 2005

The first reference to the crime of aggression in the international framework can be found in the Treaty of Versailles ⁶, in 1919, in whose article 227 is settled that *“the Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties”*, being some of the prosecuted crimes the German invasion of Belgium and war crimes committed during the First World War. According to this article, *“a special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence”*, being the decision of the tribunal *“guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality”*.

Even when William II was never tried and article 227 lacks of legal basis, it has to be noted the importance of this article since it introduced the idea of criminalizing aggression.

The next reference to the crime of aggression can be found in the Charter of the United Nations ⁷, in 1945, whose article 1 articulates that the purposes of the United Nations are *“to maintain international peace and security, (...) to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”*, among others, while its article 2(4) declares that *“all Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”*. Finally, Chapter VII is focused on *“action[s] with respect to threats to the peace, breaches of the peace, and acts of aggression”*, and article 53(1) sets that *“the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression”*, but the Charter of the United Nations does not define anywhere what must be understood as *“aggression”*.

Only five years later, the Principles of International Law, recognized in the Charter of the Nuremberg Tribunal ⁸ defined crimes against peace as the acts of *“planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances”* and the *“participation*

⁶ Paris Peace Conference, XIII. 55, 740, 743; Senate document 51, 66th Congress, 1st session, 1919. Available at: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>

⁷ United Nations, “Charter of the United Nations”, 24 October 1945, 1 UNTS XVI, available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

⁸ UN General Assembly, “Principles of International Law recognized by the Charter of the Nuremberg Tribunal”, 11 December 1946, A/RES/95, available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf

in a common plan or conspiracy for the accomplishment of any of (...) [those] acts”, again without specifying what is meant by “aggression”.

Thus, the first definition of “aggression” is found in the United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 ⁹, according to which *“aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”*. This resolution also includes a definition of what is understood as “State” and a list of acts which can be qualified as acts of aggression regardless the declaration of war.

Nowadays, according to article 5(1) of the Rome Statute ¹⁰, the crime of aggression is one of the four crimes over which the International Criminal Court has jurisdiction, namely aggression, genocide, crimes against humanity and war crimes. Even so, until 2010 article 5(2) stipulated that *“the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 [which refers to amendments and reviews of the Statute] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”*

According to this, on 11th June, 2010, the Review Conference of Rome Statute ¹¹ (held in Kampala, Uganda) adopted an amendment to the Rome Statute including the definition of the crime of aggression by consensus. This definition can be found in article 8bis of the Rome Statute ¹², which mixes the definition given by the Principles of International Law recognized in the Charter of the Nuremberg Tribunal of crimes against peace, and the definition of “aggression”, found in the United Nations General Assembly Resolution 3314 (XXIX).

In this line, article 8bis of the Rome Statute defines “crime of aggression” as *“the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”*. The same article, qualify as acts of aggression *“the use of armed force by a State against the sovereignty, territorial integrity or*

⁹ UN General Assembly, “Resolution 3314 (XXIX) Definition of Aggression”, available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>

¹⁰ UN General Assembly, “Rome Statute of the International Criminal Court”, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹¹ Coalition for the International Criminal Court, “The Crime of Aggression”. Available at: <http://www.iccnw.org/?mod=aggression>

¹² UN General Assembly, “Rome Statute of the International Criminal Court (last amended 2010)”, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf>

political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”, and annexing to this definition the list drafted in the United Nations General Assembly resolution 3314 (XXIX).

Thus, crime of aggression is understood as “*the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof (...) [the] bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State, (...) the blockade of the ports or coasts of a State by the armed forces of another State, (...) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State, (...) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement, (...) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State (...) [and] the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein*”, bearing in mind that it has to constitute a manifest violation of the Charter of the United Nations by its character, gravity and scale.

II. LEGITIMACY OF THE CRIME OF AGGRESSION UNDER THE CRITICAL CRIMINOLOGY

Below there will be analysed the crime of aggression, as it is typified in the Rome Statute from a quadruple perspectives, namely the *ratione materiae*, that is which acts can be prosecuted as crimes of aggression; the *ratione personae*, that is who can be prosecuted as a perpetrator of a crime of aggression; the *ratione loci*, that is where has to be the act committed in order to be prosecuted, and the *ratione temporis*, that is when the crime of aggression has to be committed in order to be prosecuted.

a. RATIONE MATERIAE

As it is described above, article 8bis of the Rome Statute articulates what is understood as a crime of aggression, namely “*the planning, preparation, initiation or execution of an act of aggression, that is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*”. This act of

aggression, by its character, gravity and scale, has to constitute a manifest violation of the Charter of the United Nations.

Here various problems can be found, all of them referring to the vague definition of the crime of aggression. Hence, even when the Rome Statute includes a list of actions that can be qualified as acts of aggression, it calls for a special "character, gravity and scale", being the three of them cumulative, permitting to qualify the crime, but without objectively defining the line between the act and the crime of aggression.

The article also requires a manifest violation of the Charter of the United Nations for an act of aggression to become a crime of aggression, being the term "manifest" again a subjective qualification.

This vagueness in the distinction between act and crime of aggression, while supposing a manifest violation of the legal principle of legality (clarity), can be an advantage for those states with international influence, since, according to article 15bis(6) of the Rome Statute, "*where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned*", and it has to be remembered that the Security Council is nothing but a political organ.

b. *RATIONE PERSONAE*

According to the article 8bis of the Rome Statute, *the perpetrator has to be a person in a position effectively to exercise control over or to direct the political or military action of a State which committed this act of aggression*", limiting thus the leadership element from individuals with shape or influence, as it was contemplated in both Nuremberg and Tokyo trials, to leaders de facto, that is to say, individuals who directly control or direct a state's political or military action¹³.

Also, even when there is no requirement to prove that the perpetrator has made a legal evaluation of whether the use of armed force was inconsistent or not with the Charter of the United Nations, according to the *mens rea* element of the crime of aggression, the perpetrator has to be aware of the circumstances that make that use of armed force inconsistent with the Charter of the United Nations, being also mentally competent in order to commit the crime and not having committed it by mistake. This legal precept allows, as possible perpetrators of the crime of

¹³ Heller, K. J. "Retreat from Nuremberg: the leadership requirement in the crime of aggression". *European Journal of International Law*, 2007, vol. 18, no 3, p. 477-497.

aggression, a maximum of one or two individuals per country. Here, it is important to notice that these individuals are often the leaders of the country, so they enjoy of personal immunity and, if not leaders with diplomatic status, they are usually so beloved by civilians that its international pursuit could cause a breach in international peace, which is exactly the opposed to the Charter of the United Nation's objectives.

Again, this benefits the leaders of those countries with more international influence since the international community would not take the risk to pursue the leaders of certain powerful countries in case of committing aggression. Remember, as said before, that the Security Council has a major word on the prosecution of the crime of aggression.

c. *RATIONE TEMPORIS*

According to the conditions for entry into force disposed in Kampala¹⁴ and the article 15*bis*(2,3), the jurisdiction of the International Criminal Court will not be activated until 1st January, 2017, and it can only exercise jurisdiction with respect to crimes of aggression committed one year after the ratification of the Kampala amendments by thirty States Parties¹⁵. On 29th March, 2016, only 28 States Parties had ratified the Kampala amendments¹⁶.

This condition constitutes an advantage for the most influential countries for two reasons: first, those countries that are capable of committing crimes of aggression will, if they want to, commit it before the entry into force of Article 8*bis* of the Rome Statute, as the international community could check on March, 2014. Secondly, as already mentioned, even when the minimum date of entry into force of this crime's jurisdiction by the International Criminal Court is on 1st January, 2017, it will not be effective until one year after the ratification of the Kampala amendments by 30 countries.

As said, nowadays, six years after the Kampala conference, only 28 countries have ratified the Kampala amendments, so still if the two missing countries ratified it today, the minimum date of entry into force would be on 24th May, 2017. Thus, the most influential countries and, therefore those with the sufficient power to commit

¹⁴ Coalition for the International Criminal Court, "The Crime of Aggression". Available at: <http://www.iccnw.org/?mod=aggression>

¹⁵ Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, "Conditions for action by the ICC". Available at: <http://crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc/>

¹⁶ Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, "Status of ratification and implementation". Available at: <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/>

crimes of aggression, could delay the entry into force as well as its influence allows them.

d. *RATIONE LOCI*

This is certainly the element in which the application of critical criminology in the description of how the drafting and/or application of the crime of aggression may be beneficial for certain powers, especially those with more power to commit the crime in question, can be seen in a clearer way.

Thus, as article 15*bis*(4) of the Rome Statute says, "*the Court may (...) exercise jurisdiction over a crime of aggression, (...) committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.*" Besides, article 15*bis*(5) says, that "*in respect of a State that is not a party (...) [of the Rome Statute], the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.*"

Hence, not only the leaders of the most influent countries have all the formerly explained advantages and facilities to not being prosecuted for a crime of aggression, but also this article, as an exception, allows reservations. So even and being State Parties of the Rome Statute, countries can declare that they do not accept the International Criminal Court's jurisdiction over crime of aggression, implying that this jurisdiction will not be applied on them, as the vast majority of countries with the power to commit the crime of aggression have done so far.

In consequence, the situation is further aggravated since not only the draft of the crime of aggression in the Rome Statute denotes certain advantages for specific powers, but it directly allows countries to commit crimes of aggression without being prosecuted by the International Criminal Court.

CONCLUSIONS

Even when the inclusion of the jurisdiction over the crime of aggression in the Rome Statute and its subsequent drafting in the Kampala conference is a giant step for the international recognition of the illegality of the use of force against the sovereignty, the territorial integrity or the political independence of one State over another, as it has been shown throughout this paper, this step skims the symbolic.

As it has been analysed, the crime of aggression is a perfect example of the premises of critical criminology, confirming thus the hypothesis that crime of aggression, as it is currently typified, does not criminalize the actually capable powers to commit crime of aggression, whereby the efforts made in order to prevent and punish this crime are not effective at all. The problem of its drafting and application can be resumed in four points:

First, the vague definition of the crime of aggression and the distinction between act and crime of aggression. While it supposes a manifest violation of the principle of legality, it can also be an advantage for those states with international influence, since, the Security Council, a political organ, has a major word in the determination of acts of aggression committed by states.

Secondly, since the draft of article 8*bis* of the Rome Statute limits the leadership element to leaders de facto, that is to say, individuals who directly control or direct a state's political or military action, there are just one or two possible perpetrators of the crime of aggression per country. It is important to take into account that these individuals are often the leaders of the country so they enjoy of personal immunity and, if not leaders with diplomatic status, they are usually so beloved by civilians that its international pursuit could cause a breach of international peace, so the international community would rather not take the risk to pursue the leaders of certain powerful countries in case of committing aggression.

Thirdly, since the jurisdiction of the International Criminal Court will not be activated until 1st January, 2017, and it can only exercise jurisdiction with respect to crimes of aggression committed one year after the ratification of the Kampala amendments by thirty States Parties, those countries that are capable of committing crimes of aggression could either commit aggression before the entry into force of the International Criminal Court's jurisdiction, or delay the entry into force as well as its influence allows them.

Finally, the Rome Statute allows reservations on article 8*bis*, so countries can declare that they do not accept the International Criminal Court's jurisdiction over crime of aggression so this jurisdiction will not apply to them, which directly allows countries to commit crimes of aggression without being prosecuted by the International Criminal Court.

In accordance with those points, four lines of improvement in the drafting and implementation of the crime of aggression are proposed below:

First, it is proposed a clearer definition of the crime of aggression and an objective distinction between act and crime of aggression. Secondly, an elimination of the limitation of the leadership element is suggested, leaving the *ratione personae* to any individual who commits the crime, as certain large companies could do in order to extract economic benefits from some countries. Thirdly, even when it is no longer possible, the ratification of the Kampala amendments by thirty States Parties for the International Criminal Court's jurisdiction to be activated, seemed to be unnecessary.

Finally, and given the impossibility of creating a law that embraces all countries of the world without exception, it is proposed that crime of aggression

should not constitute an exception within the Rome Statute as regards to the reservations, which would allow the 122¹⁷ countries that have ratified the Rome Statute knowing that the crime of aggression would fall within the jurisdiction of the International Criminal Court, to be prosecuted if they committed it.

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¹⁷ Coalition for the International Criminal Court, "Ratification of the Rome Statute". Available at: <http://www.iccnw.org/?mod=romeratification&lang=en>

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